MAJLIS PERBANDARAN PULAU PINANG

v.

LEMBAGA RAYUAN NEGERI PULAU PINANG & ANOR

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
[ORIGINATING MOTION NO: 25-9-97]
2 OCTOBER 1998

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Housing developer - Local Authority imposing "development charge" on developer and rejecting application for rebate thereof - Appeal against refusal to allow rebate - Whether "rebate" not an appealable matter - Whether appeal bad in law - Whether Appeal Board considering merit of a non-existent appeal - Town and Country Planning Act 1976, ss. 22(3), 23(1) - Local Government Act 1976, ss. 39, 102, 103, 106*

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Housing developer - Appeal Board ordering refund of "development charge" to developer - Whether committing a jurisdictional error - Whether adopting an 'unfair procedure' that constitutes an error of law - Whether certiorari should issue - Town and Country Planning Act 1976, ss. 22(3), 23(1) - Local Government Act 1976, ss. 39, 102, 103, 106*

LOCAL GOVERNMENT: *Rates - "Development charge" - Payment of - Local Authority imposing "development charge" not in pursuance of any by-law - Whether without legal basis and of no effect - Local Government Act 1976 ss. 39, 102, 103, 106 - Straits, Drainage and Building Act 1974, s. 132 - Town and Country Planning Act 1976, s. 22(3), 23(1)*

STATUTORY INTERPRETATION: *Construction of statutes - Town and Country Planning Act 1976, s. 23(1)(a) - Words "any condition imposed in granting the planning permission" therein - Whether "rebate" on "development charge" given by Local Authority to housing developer a "condition imposed by the local authority in granting planning permission"*

This was an application for judicial review, for the issue of a writ of *certiorari* to quash the decision of the first respondent ('the appeal board'). The facts were that the second respondent, Junimas Sdn Bhd ('JSB'), had wanted to develop the properties known as Lots 3491 and 3492, Mukim Fettes, North East District, Pulau Pinang, and had applied to the applicant for planning permission thereof. On 14 May 1990 the applicant granted the planning permission, but made the same subject to the payment of a certain

a "development charge". JSB did not appeal against the condition, although they could do so, within one month thereof, upon the words of s. 23 of the Town and Country Planning Act 1976 ('TPCA 1976').

On 22 July 1994, JSB paid 50% of the development charge amounting to RM451,247.17. On 5 September 1994, however, JSB applied for a rebate of *b* 50% of the development charge. This application for rebate notwithstanding, on 17 September 1994, in an effort to facilitate issuance of the certificate of fitness, JSB paid the RM451,247.17 balance payment of the development charge.

c On 17 October 1995, the applicant rejected JSB's application for rebate aforesaid, and on 28 October 1995 it confirmed the said decision. JSB was dissatisfied with the applicant's decision of 28 October 1995 **that rejected their application for rebate**, and so, on 27 November 1995, they appealed to the appeal board. The facts showed, however, that JSB's notice of appeal *d* categorically stated that the appeal was **"against the decision of the applicant on 28 October 1995 which gave the planning permission subject to conditions**".

At the hearing of the appeal, the applicant raised the preliminary objections, *inter alia*, that the appeal board had no jurisdiction to hear the appeal and *e* that the appeal, being out of time by some five years and five months, ought to be disallowed. The appeal board held, however, that, notwithstanding that there was no proper appeal filed or that the purported appeal was out of time, it had the jurisdiction to hear the appeal as (i) the imposition of the development charge was an appealable matter (ii) the matter of the applicant's *f* refusal to allow rebate, ie, the decision of 28 October 1995, was caught by s. 22(3) of the TPCA 1976, and was likewise an appealable matter under s. 23(1) thereof, and (iii) time for the appeal ought to be extended in the circumstances. These apart, the appeal board also ruled that the imposition of the development charge as a condition of planning approval on 14 May 1990 *g* was wrong in law, and in consequence allowed JSB's appeal and ordered the refund of the full amount of the development charge to JBS. The applicant alleged that the appeal board's decision was contrary to law, was an error on the face of the record and was in excess of jurisdiction. Hence, the application herein.

h **Held:**

[1] The appeal board had no jurisdiction to hear an "appeal" against the imposition of development charge because there was no such appeal before it.

i

[1a] JSB's notice of appeal clearly stated that JSB was appealing against the decision of the applicant on 28 October 1995 which gave the planning permission subject to condition. It ought to be noted that the decision of 28 October 1995 was the decision of the applicant rejecting the application for a rebate of 50%. That decision did not impose the development charge. The approval of the planning permission, and hence the imposition of the development charge, was made by the applicant some five years and five months earlier. JSB's notice of appeal, in the circumstances, was bad in law.

[2] At the very least the notice of appeal was misleading and, for all intents and purposes, there was no appeal before the appeal board against the imposition of the development charge. Consequently, it was improper for the appeal board to hear "the appeal" on the imposition of the development charge. What the board did was to consider the merit of a non-existent appeal.

[3] The appeal board was wrong in granting extension of time as (i) there was no notice of appeal filed against the imposition of development charge (ii) there was no proper application for extension of time to file a notice of appeal in respect of the imposition of development charge (iii) the delay of five years and five months was too long (iv) to allow an extension of time under the circumstances would create havoc in the administration of justice and greatly prejudice the other party. Clearly, a party wishing to question the legality of the act of another must also act legally by coming to the court in accordance with the provisions of the law.

[4] Section 23(3)(a) of the TPCA 1976 provides for an appeal against **"any condition imposed in granting the planning permission**". This being the case, an appeal does not therefore lie against the applicant's rejection of JSB's application for a rebate. Rebate is not a condition imposed by the applicant in granting the planning permission. Indeed it can never be as it is just an incentive given to good developers. Rebate therefore is not a matter which is appealable under s. 23 of the TPCA 1976.

[4a] Since no appeal would lie against the applicant's refusal to grant the rebate, it is clearly contrary to law for the appeal board to hear an "appeal" against the imposition of the development charge (which appeal was not before the board) or to grant an extension of time to hear such an "appeal" during the hearing on another "appeal" on a matter which is not appealable. It follows that the appeal board had committed an error of law, indeed a jurisdictional error in hearing both "appeals". At the very least, in respect of the "appeal" against the imposition of the

development charge, the appeal board had adopted an "unfair procedure" which constitutes an error of law. On this ground alone, this application ought to be allowed.

Obiter dictum:

[1] Bearing in mind the findings aforesaid, it is no longer necessary to decide on whether the development charge was lawfully imposed or not. Nonetheless, in case a decision thereon is necessary, this court must say, albeit by way of *obiter*, that the appeal board was right in ruling that the imposition of the development charge was without any legal basis. Clearly, such development charge could only be imposed by a by-law confirmed by the State Authority and published in the gazette.

[Application allowed; order for repayment of development charge to JSB quashed.]

Cases referred to:

Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1981] 1 MLJ 238 FC ***(foll)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(foll)***

Sinnathamboo v. Minister for Labour & Manpower [1981] 1 MLJ 251 ***(foll)***

Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v. Majlis Perbandaran Pulau Pinang [1996] 3 CLJ 335 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Worker's Union [1995] 2 CLJ 748 CA ***(foll)***

Legislation referred to:

Local Government Act 1976, ss. 39, 102, 103, 106
Street, Drainage and Building Act 1974, s. 132
Town and Country Planning Act 1976, ss. 22(3), 23(1)(a), 32(3), 35, 36

For the applicant - Karin Lim Ai Ching (Dominic Pillai with him); M/s Presgrave & Matthews

For the 1st respondent - Che Ruzima Ghazali

For the 2nd respondent - Dato' Lakbir Singh (Jagjit Kaur with him); M/s Lakbir Singh Chahl & Co

Reported by WA Sharif

JUDGMENT

Abdul Hamid Mohamad J:

By a notice of Originating Motion dated 10 March 1997, the Majlis Perbandaran Pulau Pinang (MPP, the applicant herein) applied for the following orders:

(a) An order of *certiorari* to remove into this court and to quash the decision of the Appeal Board of the State of Penang, constituted under s. 36 of the Town and Country Planning Act 1976 made on 16 January 1997, holding that:

i) it had jurisdiction to consider the appeal by the 2nd respondent notwithstanding that there is no proper appeal filed or that the purported appeal was out of time under s. 23 of the Town and Country Planning Act 1976 ("TCPA 1976").

ii) In the judicious exercise of its discretion it should extend the time for the appeal.

iii) As regards the challenge by the 2nd respondent against the applicant's refusal to allow rebate to the development charges ie, (the applicant's decision of 28 October 1995) it properly fell within the scope of s. 22(3) of the TCPA 1976 and could therefore validly be the subject matter of an appeal under s. 23(1) of the TCPA 1976.

(b) An order of *certiorari* to remove into this Honourable Court and quash the decision of the Appeal Board given on 24 January 1997 the 2nd respondent's appeal and in:

i) holding that the imposition of the development charge as a condition of planning approval on 14 May 1990 are done without legal basis and/or

ii) for failing to act under s. 102 and 103 of the Local Government Act 1976 and

iii) directing there be a repayment to the 2nd respondent of the full development charges and the interest levied on it.

The chronology of events are as follows:

On 28 August 1989, the second respondent (the owner/developer) submitted an application for planning permission to erect 10 blocks of condominiums (330) units and one block of double storey semi-detached houses (two units) on Lots 3491 and 3492, Mukim Fettes, North East District, Pulau Pinang.

On 12 May 1990, the second respondent submitted a building plan for the proposed development.

On 14 May 1990, the second respondent was granted planning permission which was valid for one year subject to conditions, *inter alia*:

> development charge shall be paid for units exceeding 15 units per acre at the rate of RM5 per sq. ft. in accordance to the councils guidelines.

The second respondent did not appeal against the imposition of this condition to the appeal board nor challenged the condition in court.

On 9 August 1990, the applicant approved the building plan subject, *inter alia*, to the same condition regarding development charge.

On 14 August 1990, the then secretary of the applicant (who is now the counsel appearing for the second respondent) informed the second respondent that the building plan had been approved by the applicant on 9 August 1990 subject to the conditions.

On 22 May 1991 the second respondent's architects wrote to the applicant applying for permission to commence work. At this point of time the second respondent had not paid the development charge imposed by the applicant.

On 7 August 1991 the second respondent gave an undertaking to the applicant to pay the development charge.

On 16 August 1991, the applicant wrote to second respondent's architects informing them that the commencement of work was authorised.

On 20 May 1992 the applicant wrote to the second respondent informing them that the planning permission had been extended from 14 May 1991 to 13 May 1992.

Amended building plan was approved by the applicant on 25 April 1994.

In the meantime, in 1992, the adjoining landowner had applied to the High Court *vide* Originating Motion No. 25-19-92 for an order of *certiorari* to quash the planning permission granted by the applicant to the second respondent.

On 17 July 1992 the second respondent applied to intervene in the Originating Motion and was allowed to do so. The second respondent defended the planning permission. The planning permission was upheld by this court on 16 April 1993. The adjourning landowner appealed to the then Supreme Court.

On 22 July 1994 while the appeal against the decision of the High Court to the Supreme Court was still pending, in which appeal the second respondent was on the side of the present applicant, the second respondent paid 50% of the development charge amounting to RM451,247.17. It should be noted that the development charge should have been paid in full prior to the

commencement of work. However, on an undertaking to pay given by the second respondent, the applicant had authorised the second respondent to commence work.

However, hardly two months later, on 5 September 1994 the second respondent applied to the applicant for a rebate of 50% of the development charge.

On 17 September 1994, the second respondent made payment of the balance of the development charge outstanding amounting to RM451,247.18 together with interest.

Eleven days later, on 28 September 1994, the applicant issued to the second respondent the certificate of fitness for occupation in respect of the development.

On 21 February 1995 the Federal Court dismissed the appeal by the adjourning landowner and upheld the second respondent's planning permission.

On 17 October 1995, the applicant rejected the second respondent's application for 50% rebate of the development charge. That decision was confirmed by the applicant on 28 October 1995.

On 30 October 1995 the applicant wrote to the second respondent's architect communicating the applicant's decision rejecting the second respondent's application for rebate.

On 27 November 1995 the second respondent appealed against the decision of 28 October 1995 in disallowing the second respondent's application for rebate of 50% of development charge imposed.

On 2 December 1996, the second respondent's appeal was heard by the appeal board. The applicant raised certain preliminary objections as to the jurisdiction of the appeal board to hear the appeal and the issue whether the appeal was out of time.

On 16 January 1997, the appeal board dismissed applicant's preliminary objections and proceeded to hear the appeal.

On 24 January 1997, the appeal board gave its decision. On the preliminary objection, the appeal board held that the imposition of development charge was appealable. Even though the appeal was out of time by some five years and five months, the board "in the judicious exercise of its discretion" extended the time to appeal. The board also held that an appeal lay from the refusal to grant the rebate.

The board then went on to consider whether the applicant had authority to levy the development charge. It considered the provisions of the Local Government Act 1976, in particular ss. 39, 102, 103 and 106 held:

> It is just as clear that no local authority can claim it has, *suo motu*, legislative powers. The local authority may make any by-law it deems necessary for the performance of its functions, including the levying of any taxes, rates, rents ... and other sums, any such by-law, rule or regulation has no effect until it is confirmed by the State Authority and published in the Gazette. Once there is such a publication, no challenge can be had to the confirmation and every member of the public must be taken to have notice of it.

The board further held that as the "guide-lines" (or Dasar-Dasar/Garispanduan-Garispanduan) under which the development charge was imposed were neither approved by the State Authority nor published in the Gazette, the guide-lines were not "unchallengeable". The board went on to say:

> Even considered as a by-law properly made under the statutory powers given to MPPP, the Infrastructure Development Charge, by reason of the failure to publish it in the Gazette, is caught by provision of s. 103 of the Local Government Act 1976 and has no legal effect.

On the provisions of ss. 132 of the Street, Drainage and Building Act 1974 and s. 32(3) of the Town and Country Planning Act 1976, the board said:

> The wording of this s. 32(3) is so without relevance to the matter in hand that I can only conclude I have not heard Dr. Dass correctly. On the other hand, I cannot myself find any provision that qualifies s. 132 of the Street, Drainage and Building Act 1974.
>
> With the greatest of respect, I do not agree. Requirements of payment into the Improvement Service Fund must be laid down in specific by-laws, rules or regulations/and where there are no such by-laws, rules or regulations which are effective, then, even if a development charge comes within the categories laid down in the section – the beautification, construction or lay-out of any street, drain, gutter or water-course – it cannot be demanded or required to be paid.

In short, the board was of the view that the development charge could only be imposed if there was a by-law confirmed by the State Authority and published in the gazette. Since the guide-lines did not fulfill the conditions it was of no effect as authority to impose the development charge. So the imposition of the development charge was unlawful.

The board also disagreed with the argument of learned counsel for the applicant that the second respondent was estopped from claiming a refund. The board's reason was: "it is a matter of grave doubt that the payment of the development charge can be termed a consensual agreement to raise the issue of estoppel.

As a result the board allowed the appeal by the second respondent and ordered the applicant to repay the full development charge paid by the second respondent.

Perhaps I should summarise here the events that led to this application.

The second respondent wanted to develop its land. It wanted to build more units than normally allowed. It submitted an application for planning permission.

The applicant approved the application with condition that the second respondent pays a development charge. A development charge is imposed to ensure that the existing sewer system is upgraded as a result of higher density approved by the applicant. The second respondent did not appeal against the imposition of the condition.

Then, the second respondent submitted an application for a building plan for the said development. This was approved, again, with the same condition.

After that the second respondent applied for permission to commence work. The development charge should be paid before work commences. The second respondent did not pay, but instead gave an undertaking to pay. Based on that undertaking the applicant authorised work to commence.

In the meantime the applicant was sued by the adjoining landowner for approving the development plan of the second respondent. The adjoining landowner was seeking a declaration that the plan approved by the applicant was void. Its effect on the second respondent's project was obvious. So the second respondent joined the applicant to defend the action. The case went right up to the Supreme Court and they won the case. While that case was pending the second respondent paid 50% of the development charge.

The next step was that the respondent wanted the certificate of fitness to be issued. It is clear that the certificate of fitness would not be issued if the balance development charge was not paid. Second respondent asked for a rebate of 50%, which actually was the balance it had to pay but 12 days later paid the balance development charge. In less than two weeks the certificate of fitness was issued.

Five months later the Supreme Court dismissed the adjourning landowner's appeal. Eight months later the applicant rejected the second respondent's application for rebate.

The second respondent then appealed. The notice of appeal very clearly states that the appeal was against the decision of the applicant on 28 October 1995 rejecting the second respondent's application for rebate.

But the second respondent got more than what it asked for because the appeal board went further and gave an extension of time to appeal against the imposition of the development charge (even though there was no formal application for extension of time, nor was the notice of appeal amended at any time) and decided that the imposition of the development charge was wrong in law and ordered the refund of the full amount of development charge and the interest thereon paid by the second respondent.

Those are the facts. Now the law.

This is an application for judicial review, for the issue of a writ of *certiorari* to quash the decision of the appeal board. So much have been written by learned judges of higher courts in this country that it would serve no purpose for me to try to re-state the law or even to repeat it. I will only refer to two recent decisions. The first is a decision of the Court of Appeal. The case is *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Worker's Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 CA. In that case Gopal Sri Ram JCA said that an inferior tribunal or other decision making authority, whether exercising a quasi judicial function or a purely administrative function, has no jurisdiction to commit an error of law, whether the error is jurisdictional or not. Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunised from judicial review by any ouster clause however widely drafted.

The learned appellate judge further said that jurisdiction is exceeded when an error of law is committed, an unfair procedure is adopted or where the decision reached is unreasonable. However it is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed.

Similarly V.C. George JCA said that it was time to discard the distinction between an error of law which affected jurisdiction and one which did not. Inferior courts as statutory tribunals were not given the jurisdiction to make an error of law and it followed that such errors of law, whether on the face of the record or not, in reality went to jurisdiction.

In *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 FC, Eusoff Chin, CJ (Malaysia) said at p. 183:

> It is clear that the High Court and the Federal Court have adopted a liberal and progressive approach in *certiorari* proceeding, and I find that where the particular facts of the case warrant it the High Court should endeavour to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.

Edgar Joseph Jr. FCJ, in the same case said that a decision susceptible to judicial review was not only open to challenge on the ground of procedural impropriety but also on the grounds of illegality and irrationality, and in practice, this permits the court to scrutinise such decisions not only for process but also for substance.

The ground fowarded by learned counsel for the applicant was that the Appeal Board's decision dismissing the applicant's preliminary objection was contrary to law, reflecting an error on the face of the record and was in excess of jurisdiction.

In this case, the applicant imposed the condition of payment of development charge when the planning permission was approved, way back in 1990.

There is no doubt that the imposition of the development charge was appealable under s. 23 within one month from the date of communication of the imposition of the same. The appeal board hearing the appeal may, *inter alia*, remove or modify such condition – s. 23(3).

But the second respondent did not appeal. Indeed there was no appeal against the imposition of the development charge at any time. The appeal filed by the respondent on 27 November 1995 (five years and five months after the imposition of the development charge) states as follows:

> KAMI JUNMAS SENDIRIAN BERHAD ... adalah dengan ini merayu kepada Lembaga Rayuan terhadap keputusan MAJLIS PERBANDARAN PULAU PINANG ... yang dibuat pada 28 OKTOBER 1995 ... yang memberi kebenaran merancang tertakluk kepada syarat-syarat ...

It should be noted that, first, the decision made on 28 October 1995 was the decision of the applicant rejecting the application for a rebate of 50%. That decision did not impose the development charge.

Secondly, the notice of appeal said that the second respondent was appealing against the decision of the applicant on 28 October 1995 which gave the planning permission subject to conditions. That again is clearly bad for the following reasons: first, that decision on 28 October 1995 did not approve the planning permission subject to conditions. The approval of the planning permission subject to conditions was made five years and five months earlier. The decision of 28 October 1995, I repeat, was only to refuse the application for rebate of the development charge. Secondly, the notice of appeal did not specify which of the conditions it was appealing against. Thirdly, there was no amendment of the notice of appeal at any time, to include an appeal against the imposition of the development charge. Fourthly, the respondent was out of time by more than five years to appeal against the imposition of the development charge. There was no application for extension of time to file an appeal against the imposition of the development charge.

At the very least, the notice of appeal, in saying that the second respondent was appealing against the decision of the applicant made on 28 October 1995 which granted the planning permission subject to conditions, was misleading even if it was not intended to mislead.

For all intends and purposes there was no appeal before the appeal board against the imposition of the development charge. It is true that in the "alasan-alasan" it is said:

> The appellants are aggrieved by the said decision of the Majlis Perbandaran Pulau Pinang and hereby appeal against the whole of the condition regarding the payment of a development charge **and alternatively** (emphasis added) against the decision of the council disallowing the appellant's application for a rebate of 50% of the development charge under the subsisting policy.

To me "alasan-alasan" in relation to an appeal is nothing but "grounds" of appeal.

In my view, "alasan-alasan" or "grounds" are reasons for the appeal, not the appeal. What the appeal is, is clearly stated in the notice of appeal, as it should be, and that is against the decision made on 28 October 1995. That was all that the respondent appealed against. In my view, with, respect, it is improper to add a fresh appeal against an order made on a different date in the "alasan-alasan" or grounds of appeal. In my judgment, that "alasan" or ground is of no effect to add a fresh appeal against another order of a different date.

Furthermore, that "fresh appeal" was also out of time by more than five years and as there was no order extending time to file such an appeal at that time it was also void and of no effect. In other words there was no appeal against the imposition of development charge before the appeal board.

In the circumstances, was it proper for the appeal board to hear "the appeal" on the imposition of the development charge? The appeal board took the view that, since the board found that there were some doubt as to the validity of the development charge it "must accept the duty to the appeal." The judgment went on to say: "We will therefore hear the appeal, if necessary, giving an extension of time for doing so."

What the appeal board did was to consider the merit of a non-existent appeal and since it was of the view that there was merit, it went on to hear the "appeal" which was non-existent.

In *Fung Keong Rubber Manufacturing (M) Sdn. Bhd. v. Lee Eng Kiat & Ors* [1981] 1 MLJ 238 FC, the appellant had dismissed the respondents on 17 November 1973. The respondents applied to the appellant to reemploy them but the appellant refused. The respondents then made representations to the director general of Industrial Relations and when efforts at a settlement failed, the director general notified the matter to the Ministry who referred the matter to the Industrial Court on 30 September 1976. It was held that:

(1) under section 20(1) of the Industrial Relations Act, 1967, a workman who claims re-instatement for wrongful dismissal must present his claim within one month of the dismissal. If the claim is not made within one month the Industrial Court has no jurisdiction to consider the claim;

(2) in this case as the claim was made well outside the time limit the court could interfere with the exercise of the Minister's discretion in referring the matter to the Industrial Court and the Industrial Court should have held that it was wrongly conferred with jurisdiction.

In *Sinnathamboo v. Minister for Labour & Manpower* [1981] 1 MLJ 251, the director general of Industrial Relations refused to entertain a representation made by the applicant less than two months after he was dismissed. Mohamed Azmi J (as he then was) held that the one-month time limit under the Act was a mandatory provision and failure to comply was fatal to the claim.

In those two cases representations (which can be equated the appeal here) were made, but out of time, In *V. Sinnathamboo's* case, by less than a month. In the present case, there was no appeal at all against the imposition of the development charge. In other words, the second respondent in this case was in much weaker position compared with the applicant in the two cases referred to. With greatest respect, I am of the view that the appeal board had no jurisdiction to hear an "appeal" against the imposition of development charge because there was no such appeal before it.

Was the board right in granting an extension of time? In the first place there was no notice of appeal filed against the imposition of development charge. There was no such appeal. The matter only came up before the court, obliquely. Secondly, there was no proper application for extension of time to file a notice of appeal and the notice of appeal against the imposition of development charge was never filed at any time. Thirdly, the delay was five years and five months, during which period all the necessary approvals for the development had been obtained, the building was completed and the certificate of fitness was issued, upon payment of the development charge. The delay is far too long. Fourthly, to allow an extension of time under such circumstances would create havoc in the administration of justice and greatly prejudice the other party. There will be no end to proceedings as a party,

purporting to raise a ground of illegality, may at any later time lodge an appeal, without regard to the provisions of the law pertaining to appeals. I think it is only fair that a party wishing to question the legality of the act of another should also act legally by coming to court in accordance with the provision of the law.

As I have said, the appeal against the imposition of the development charge was raised obliquely in the appeal against the rejection of the respondent's application for a rebate.

Does an appeal lie against such rejection? The appeal board answered in the affirmative. With greatest respect, I am of a different view. I am of the view that no appeal lies against the refusal by the applicant to grant a rebate.

Provision for appeal is to be found in s. 23:

> 23(1) An appeal against the decision of the local planning authority made under section 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him, by -
>
> (a) an applicant for planning permission aggrieved by the decision of the planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission; and
>
> (b) any person who has lodged an objection pursuant to section 21(6) and is aggrieved by the decision of the local planning authority in relation to his objection.

Paragraph (b) is clearly not relevant in the present case and does not require any discussion. Regarding (a), the only relevant part is the second limb, ie, appeal against **any condition imposed in granting the planning permission**.

Rebate is not a condition imposed by the applicant in granting the planning permission. Indeed it can never be.

Form 2 of the Appeal Board Rules 1989, a statutory form, is equally clear:

> I/We ...
>
> do hereby appeal to the Appeal Board against the decision of the ... (local planning authority) ... made on ... refusing to grant planning permission/granting planning permission subject to conditions/in relation to my/our objection.

This was the form used by the respondent. In *Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Berhad v. Majlis Perbandaran Pulau Pinang* [1996] 3 CLJ 335 (CA) the facts, in so far as they are relevant to the present discussion, were that the planning permission given earlier was

due to expire on 5 September 1992. The appellant (in that case) applied for an extension of the same on 2 September 1992. The respondent considered the application on 20 July 1993. On 30 July 1993 the respondent informed the appellant that an extension, effective from 6 September 1992 to 5 September 1993, was granted. Additional conditions were imposed including the disputed "second condition". On 10 August 1993, the appellant appealed against the imposition of the additional second condition. On 20 September 1993, the respondent rejected the appeal.

Mahadev Shanker JCA, delivering the judgment of the court said at p. 373:

> The respondent's decision on 20 September 1993 was not made under s. 22(3) read with s. 24(5) of the Act and was therefore not an appealable matter under s. 23.

So, even the rejection of an "appeal" against the imposition of additional condition made when the planning permission was extended was held to be unappealable as it was not made under s. 22(3), in that case, read with s. 24(5).

If that does not fall under matters appealable under s. 23, it is even more so here, since the decision appealed against is a decision refusing an application for a rebate.

How did this "rebate" come about?

On 29 October 1985, the technical committee of MPPP (applicant) decided to introduce a rebate on the development charge as an incentive to induce developers to commence construction early.

On 31 March 1986, the council approved the recommendations of the technical committee on the "Policy on Rebate of Development Charge" subject to certain conditions.

On 30 April 1987 the applicant considered a paper by the then secretary of the applicant (now counsel for the second respondent) and decided regarding quantum, under what circumstances it should be granted and the period for review of policy. The policy was extended a number of times. The final extension was until 31 December 1991. However, for all planning permission/ building plan which were approved before 31 December 1991, the rebate policy would continue to apply if building works had commenced before 31 December 1991.

The rebate is thus an incentive, given to developers who had carried out and completed the development according to the schedule and complied with all the requirements of the law and the conditions imposed by the applicant in the discharge of its duty as a local council. In other words a "bonus" given to good developers.

Rebate is not a "condition imposed by the local authority in granting planning permission" which is appealable under s. 23. Therefore, no appeal lies against the refusal to grant a rebate. It should be noted that even in the case of imposition of the development charge which is appealable, yet there is no appeal against the determination of the **amount** of the development charge.

In the circumstances I am of the view that no appeal lies against the refusal by the respondent to grant the rebate. If that is so, then, it is clearly contrary to law for the appeal board to hear an "appeal" against the imposition of the development charge (which "appeal" was not before the board) or to grant an extension of time to hear such an "appeal" during the hearing on another "appeal" on a matter which is not appealable.

The appeal board, with greatest respect had committed an error of law, indeed a jurisdictional error in hearing both "appeals". At the very least, in respect of the "appeal" against the imposition of the development charge, the appeal board had adopted an "unfair procedure" which constitutes an error of law – see *Syarikat Kenderaan Melayu Kelantan Berhad* case [1995] 2 CLJ 748; [1995] 2 MLJ 317 CA.

On these grounds, I allow the application. I would like to make it clear that I allow this application on the above stated grounds alone. In the circumstances, I do not think it necessary to decide on the question whether the development charge was lawfully imposed or not. However, in case of an appeal and the Court of Appeal finds it necessary to decide on the point and would like to know what my view is on the point, I will express my view by way of *obiter*.

Provisions regarding development charge are to be found in Part V of the Town and Country Planning Act 1976. Section 32 provides:

> 32. (1) Where a local plan or an alteration of a local plan effects a change of use, density, or floor area in respect of any land so as to enhance the value of the land, a development charge shall be levied in respect of any development of the land commenced, undertaken, or carried out in accordance with the change.
>
> (2) The rate of the development charge or the method of calculating the amount of development charge payable shall be as prescribed by rules made under section 35.
>
> (3) The State Authority may, by rules made under s. 35, exempt, any person or class of persons or any development or class, type, or category, of development from liability to the development charge, subject to such conditions as the State Authority may specify in the rules.

Section 35 provides:

> 35. The State Authority may make rules for the purpose of giving effect to and carrying out the provisions of this Part or of prescribing anything that may be, or is required to be, prescribed under this Part.

It is very clear from these provision that the rate of the development charge or the method of calculating the amount of development charge must be prescribed by rules made by the State Authority.

Learned counsel for the applicant argued that the necessary legal basis "for the imposition of development charge for sewerage improvement necessitated by the said development as a condition for planning approval" was provided by s. 132 Street, Drainage and Building Act 1974 read with s. 22(3) of the Town and Country Planning Act 1974.

Section 132 of SDBA 1974 provides:

> 132. (1) There shall be established for the purpose of this Act in each local authority a fund to be known as the "Improvement Service Fund" into which shall be paid all monies that may from time to time be paid to a local authority for the purposes of carrying out the provisions of this Act, all monies recoverable by the local authority from any person under this Act or any by-laws made thereunder and any contributions from any person towards the beautification, construction or laying out of any street, sewer, drain, culvert, gutter or water-course.
>
> (2) The Improvement Service Fund shall be administered by the local authority at its absolute discretion.

I do not think that s. 132 of the Street, Drainage and Building Act 1974 assists the applicant. That section speaks about the establishment of a fund into which monies are to be paid. The monies to be paid into that fund are the moneys paid to the local authority for the purposes of carrying out the provisions of that Act, moneys recoverable by the local authority from any person under that Act or any by-laws made under that Act and contributions from any person towards the beautification, construction or laying out of any street, sewer, drain, culvert, gutter or water-course. That section says where the money is to be kept. It does not authorise the imposition or collection of moneys. Power to impose, collect or recover such moneys are provided somewhere else in that Act itself.

What we are concerned with in this case is the power to impose development charge. Development charge is a matter provided for by the Town and Country Planning Act 1976. Section 32 and 35 of that Act also provides how the rate or the method of calculating the amount of development charge payable shall be prescribed, that is, by rules made by the State Authority under s. 35. That is the only way it can be made.

In the circumstances, I agree with the appeal board on this point.

I also agree with the appeal board that the provisions of ss. 39, 102, 103 and 106 do not assist the applicant.

The application is allowed with costs. The order for the repayment to the second respondent of the full development charge and the interest levied on it is quashed.